

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

76-1155

To be argued by
PETER D. SUDLER

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PLS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1155

In Re Application Of The United States Of America In
The Matter Of An Order Authorizing The Use Of A
Pen Register Or Similar Mechanical Device.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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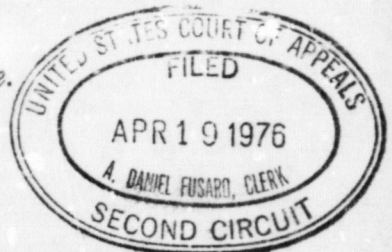


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1155

In Re Application Of The United States Of America In
The Matter Of An Order Authorizing The Use Of A
Pen Register Or Similar Mechanical Device.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The New York Telephone Company appeals from an order entered on March 19, 1976 in the United States District Court for the Southern District of New York by the Honorable Charles H. Tenney, United States District Judge, directing the Telephone Company to furnish information, facilities, and technical assistance necessary to enable agents of the Federal Bureau of Investigation to install pen registers on two telephones. The Telephone Company also appeals from an order of Judge Tenney entered on April 2, 1976 denying its motion to vacate the part of the District Court's order which required it to provide all information, facilities (including lease lines), and technical assistance necessary for the utilization of the two pen registers in question.

Statement of Facts

By an order dated March 19, 1976, the Honorable Charles H. Tenney, United States District Judge for the Southern District of New York directed the New York Telephone Company to provide information, facilities and technical assistance to Special Agents of the Federal Bureau of Investigation in connection with the installation and operation of a mechanical device known as a pen register.*

Immediately after the order was signed, FBI Special Agent Walter F. Smith went to the offices of the Telephone Company to serve a conformed copy of the order upon Leonard Dudden, an employee of the company's Security Department who serves as liaison officer in such matters. Mr. Dudden was at first unavailable to accept service, but he was later advised orally of the Court's order by Special Agent John E. Craig. Mr. Dudden told Agent Craig that the Telephone Company would refuse to provide the Federal Bureau of Investigation with the use of telephone lease lines.**

* The March 19, 1976 order was one of a series of orders issued pursuant to an ongoing criminal investigation of an organized gambling operation. Previously the government had obtained an order authorizing the interception of wire communications over another telephone at a different location. That order was authorized pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and was accompanied by an order authorizing the use of a pen register. The Telephone Company complied with both of these orders by providing the required technical assistance (including lease lines). The March 19, 1976 order, although part of the same gambling investigation, was not authorized pursuant to Title III inasmuch as it did not seek to intercept wire communications.

** The Telephone Company did consent however to provide all other information including appearances, terminal locations and information concerning the necessary pair and cable. It should be noted that without the requested lease lines this information would have required the Federal Bureau of Investigation to string its own telephone lines from the apartment where the subject telephone was located to another location where the pen register device could then be installed.

Accordingly, from March 20 through March 23, 1976, Agent Smith and other Special Agents of the FBI, canvassed the area of the subject apartment in an effort to determine a suitable location from which the monitoring of pen registers could be conducted and from which telephone cables could be strung without compromising the investigation. Due to the unsuitable location of the apartment building in which the gambling operation wire room was located and because the subjects of the investigation employed counter-surveillance techniques, it was determined that the only method by which the pen register device could be implemented was through the use of telephone lease lines (A. 24-25).*

On March 24, 1976 Special Agent Smith served a conformed copy of the District Court's order on Mr. Dudden, who informed Smith that the leasing of telephone lines in non-Title III matters was prohibited by Telephone Company regulations and that the company refused to comply with the order.

On March 30, 1976, six days later, the Telephone Company moved by order to show cause to vacate that part of the District Court's order which directed it to furnish technical assistance in the installation of the pen registers in question. That motion was denied in a nine-page opinion by Judge Tenney on April 2, 1976. The Telephone Company filed a Notice of Appeal on April 6, 1976 and immediately moved for a stay of both District Court orders. On April 8, 1976 a panel of this Court (Feinberg, Mansfield and Mulligan, *C.JJ.*), denied the motion for a stay and set the matter down for argument on an expedited basis.

* "A" refers to Appellant's Appendix.

Opinion Below

In his decision of April 2, 1976, Judge Tenney ruled that a pen register was not a "device for wire or oral interception covered by the prescriptions of Title III," (A. 102) and that the Telephone Company's refusal to assist in furnishing the necessary lines and assistance "would frustrate the operation of the court order, properly granted upon a showing of probable cause." (A. 105). The Court also adopted the reasoning of the Seventh Circuit in *United States v. Illinois Bell Telephone Co.*, Dkt. No. 75-1909 (7th Cir., Feb. 23, 1976) and held that it had inherent jurisdiction to direct compliance with its order as well as statutory jurisdiction under the All Writs Act, 28 U.S.C. § 1651. (A. 107).

ARGUMENT

POINT I

The District Court's order of March 19, 1976 authorizing use of a pen register was proper.

A. The Nature of Pen Register Surveillance.

The pen register is a device for discovering the number of other telephones dialed from the instrument to which it is attached.* It is used by telephone company personnel to check the integrity of their billing procedures and for other business purposes. Pen registers are also used by law enforcement agencies in the course of

* An excellent discussion of the technical aspects of pen registers and similar devices may be found in *United States v. Focarile*, 340 F.2d 1033, 1038-40 (E.D. Md. 1972), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (3d Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

their duties, in order to learn the numbers called from the subject telephone. The device is not used to learn the contents of a call or, indeed, even to learn if a call was completed.

The information obtained by a pen register in some cases may be obtained by subpoena in areas where Message Unit Detail service is available to the telephone company. Simply stated, Message Unit Detail is a written record of the calls placed from a given telephone, including the number called, the date, and the time of the call. The chief difference between Message Unit Detail and the results of pen register surveillance is that the pen register provides a record at the time of the call, while Message Unit Detail is not available until the end of the period to which it relates. Message Unit Detail is not available in all parts of the Bell Telephone Company System, and specifically is not available for the telephone numbers which were the subject of the order in this case.

B. Pen Register Surveillance, While a Form of Electronic Surveillance, is not Controlled by Title 18, United States Code, Sections 2510-2520.

The Legislative History of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which added sections 2510-2520 to Title 18 of the United States Code, clearly demonstrates that a pen register is not included among the devices which "intercept" a communication. Title III enacted a comprehensive statutory framework within which legitimate electronic surveillance in the form of "interceptions," or wiretapping, could occur. "Interceptions" that were not conducted in accordance with the detailed procedures set forth in Title III were not permitted, and sanctions for illegal wiretaps were established. In short, Title III deals exclusively with the interception

of wire or oral communications, and does not reach the use of devices such as a pen register, which do not "intercept" communications.

Prior to the enactment of Title III the interception and disclosure of communications was controlled by the provisions of the Federal Communications Act of 1934, particularly Title 47, United States Code, Section 605, which provided in pertinent part:

" . . . and no person not being authorized by the sender shall *intercept* any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . ." (emphasis added.)

In 1968 Title III amended that statute, making the quoted language applicable only to radio communications and leaving the control of the interception of wire communications wholly to Title III.

Under Section 605, before its amendment and the enactment of Title III, there was authority for the position that the use of a pen register did involve interceptions of wire communications and did disclose the existence of such communications, in violation of the statute. See, e.g. *United States v. Dote*, 371 F.2d 176 (7th Cir. 1966); *United States v. Guglielmo*, 245 F. Supp. 534 (N.D. Ill. 1965); *United States v. Caplan*, 255 F. Supp. 805 (E.D. Mich. 1966); *Huff v. Michigan Bell Telephone Company*, 278 F. Supp. 76 (E.D. Mich. 1967). However, each of those cases, relied upon here by the Telephone Company, depended upon the applicability of the quoted language of the original Section 605 to wire communications. The essential basis of each decision has been removed by the amendment of that section.

Further, the intent of Congress in drafting the new federal electronic surveillance statute is crystal clear:

"(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

* * * * *

shall be fined not more than \$10,000 or imprisoned not more than five years, or both."
18 U.S.C. § 2511

Inasmuch as the sanctions of Title III are aimed only at *interceptions* of wire (and oral) communications, the definition of "intercept" determines whether pen registers fall within the proscription of the statute. Title 18, United States Code, Section 2510, which contains the definitions used in the statute, states that "intercept" means "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." A pen register acquires its information, including "contents" (defined as "any information concerning . . . the existence . . . of that communication") by interpreting and printing out electric pulses, and not aurally. 18 U.S.C. §§ 2510(4) and (8).

The clearest statement of the non-applicability of Title III to pen registers occurs in the Legislative History accompanying the statute's enactment:

"The proposal legislation is not designed to prevent the tracing of phone calls. The use of a "pen register," for example would be permissible. But see *United States v. Dote*, 371 F.2d 176 (7th 1966)." U.S. Code Cong. and Admin. News, 90th Cong. and Admin. News, 90th Cong., 2d Sess., (1968) Vol. 2, p. 2178.

Judge Tenney's order is also supported by other federal courts which have adopted the position that a "pen register" device is not governed by Title III. See *United States v. Illinois Bell Telephone Co.*, No. 75-1909 (7th Cir., Feb. 23, 1976), Slip Op. at 3; *United States v. Clegg*, 509 F.2d 605, 610 (5th Cir. 1975); *United States v. Falcone*, 505 F.2d 478, 482 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States v. Finn*, 502 F.2d 938, 942 (7th Cir. 1974); *United States v. Brick*, 502 F.2d 219, 223 (8th Cir. 1974); *Korman v. United States*, 486 F.2d 926, 931 (7th Cir. 1973); *United States v. King*, 335 F. Supp. 523 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974); *United States v. Vega*, 52 F.R.D. 503 (E.D.N.Y. 1971).

C. The Permissibility of the Use of a Pen Register by Law Enforcement Officers Depends Entirely Upon Fourth Amendment Considerations.

Because it does not involve an interception of wire or oral communications, the use of a pen register by law enforcement officials is controlled by considerations outside of Title III. Those considerations were summed up by Justice Powell in his concurring and dissenting opinion in *United States v. Giordano*, 416 U.S. 505, 553-54 (1974):

"The installation of a pen register device to monitor and record the numbers dialed from a particular telephone line is not governed by Title III . . . [citations omitted]. Any doubt of the correctness of this interpretation is allayed by reference to the legislative history of Title III. . . . Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the

Fourth Amendment. [footnote omitted]. In this case the Government secured a Court Order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register." *Id.*

The most recent decisions involving pen register usage by law enforcement officials are *United States v. Finn*, 502 F.2d 938 (7th Cir. 1975) and *United States v. Illinois Bell Telephone Co.*, *supra*. In *Finn* the Court of Appeals for the Seventh Circuit reversed the decision of the District Court suppressing pen register evidence on the authority of *Dote*, *supra*. The pen register in that case had been authorized by a District Court judge upon affidavits reciting probable cause. The Court observed that *Dote's* vitality had been entirely eroded by the amendment of Section 605 of the Communications Act and went on to demonstrate that notwithstanding the confusing grammatical arrangement of amended Section 605, the clear intent of numbered clauses (2)-(6) was to provide exceptions to the general rule of non-disclosure. The Court concluded by announcing that "(a) a search warrant supported by probable cause is a 'demand of other lawful authority' within exception (6)." *United States v. Finn*, *supra* at 943.

In *Finn*, as in *Focarile*, the order was characterized as a search warrant supported by probable cause. The requirement of probable cause, and not the form of words used, is the essence of the "constitutional requirements of the Fourth Amendment" which was insisted upon by Justice Powell in *Giordano*. The element of probable cause was supplied to the District Court in this case in the affidavit of Special Agent Smith and is not contested on this appeal.

POINT II

The District Court has both statutory and inherent power to order the telephone company to furnish the assistance required to implement its order of March 19, 1976.

A. The All Writs Act, Title 28, United States Code, Section 1651 Supplies Statutory and Inherent Authority for the Court's Order.

In the circumstances of this case, refusal of the Telephone Company to provide the technical facilities, including lease lines, pursuant to the terms of the District Court's order of March 19, 1976, would defeat the entire order by rendering it incapable of effective implementation.* The order authorizing the employment of a pen register is a proper exercise of the jurisdiction of the District Court, resting as it does on the common law and the fair implications of Rule 41, Fed. R. Cr. P. *United States v. Focarile, supra*, 340 F.2d at 1041, *United States v. Giordano, supra*, 416 U.S. at 554. The Telephone Company is uniquely situated to frustrate that exercise of jurisdiction by refusing to make available the facilities and information which it alone possesses, as a consequence of its monopoly position as the only communications common carrier permitted to provide telephone service to the subscriber. To allow such a situation to remain is tantamount to delivering to the Telephone Company the ex-

* It should be observed that although the order of the District Court was entered on March 19, 1976, the government was not able to utilize the pen registers in question until April 9, 1976, one day after this Court denied the motion for a stay and some twenty-one days after the order was signed. This delay was solely attributable to the Telephone Company's refusal to comply and demonstrates the potential to thwart an ongoing criminal investigation.

clusive authority to decide when and under what circumstances, if any, pen registers may be used by law enforcement agents.*

The District Court clearly has the power to implement a proper exercise of its jurisdiction. Title 28, United States Code, Section 1651, the All Writs Act, provides, in pertinent part:

(a) The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

As noted above, the District Court had jurisdiction to enter its order authorizing government law enforcement agents to employ a pen register, and to issue whatever orders may be necessary or appropriate in aid of its jurisdiction.

Under the All Writs Act, federal courts have repeatedly recognized the power to issue such writs and orders as are necessary to protect their jurisdiction, *United States v. Moore*, 427 F.2d 1020, 1023 (10th Cir. 1970); *United States v. Illinois Bell Telephone Company*, *supra*.

* The intolerability of such a situation was recognized by the Court in *United States v. Illinois Bell Telephone Company*, *supra*, Slip Op. at 7, which reasoned:

"It seems more congruent with both reason and Congressional intent to have courts, rather than the telephone company, decide if a pen register should or should not be used. The authority to compel the cooperation of the Telephone Company is in a sense concomitant of the power to authorize the installation of a pen register, for without the former the latter would be worthless."

Clearly then, far from having neither statutory nor inherent power to compel the Telephone Company to render the assistance sought, the District Court has both statutory and inherent power because the order may fairly be characterized as being "necessary or appropriate in aid of its . . . jurisdiction and agreeable to the usages and principles of law."

B. Congress has Explicitly Recognized the Need for the Assistance of Communications Common Carriers in Electronic Surveillance of Wire Communications.

The Telephone Company argues that the body of the District Court's order is worded in such a fashion that "it directs Telephone Co. to furnish the Federal Bureau of Investigation with the capability to perform an interception." * The company argues that the Court's order thus directs the interception of communications and consequently must be obtained pursuant to the provisions of Title III. That being the case, it follows that the same information, facilities and technical assistance are required for a pen register installation as would be required for a wiretap. That argument is without merit.

Congress, in enacting the amendments to Title III which provide for compelling the assistance of communications common carriers in wiretap installations, was reacting directly to the decision of the Court of Appeals for the Ninth Circuit in *Application of United States*, 427 F.2d 639 (9th Cir. 1970). There the Court held that a telephone company could not be required to furnish information, facilities and technical assistance to government agents in connection with a Court-approved Title

* Affidavit of Frank R. Natoli, Telephone Company counsel (A-9).

III wiretap. The basis for the decision was not that the assistance was not needed but that no provision had been written into the comprehensive wiretap law expressly allowing a judge to require such assistance. Accordingly, Congress adopted amendments which permit a Court to require such assistance from communications common carriers. Title 18, United States Code, Section 2511(a) was amended to remove such cooperation from the ambit of the criminal sanctions provision and 18 U.S.C. § 2520 was amended to broaden the "good faith reliance on a Court Order" defense to both criminal and civil liability. July 29, 1970, Pub.L. 91-358, Title II, Section 211, 84 Stat. 654. The motivating intent of Congress is clear: the effectiveness of the wiretap tool to law enforcement agents would be lost if the assistance of the Telephone Company, properly compensated and protected from criminal or civil liability, could not be required.*

C. The Telephone Company Advances No Cogent Reason Why It Should Not Comply With The Court's Order.

The position of the Telephone Company is that there is no statutory or inherent power in the district court to require it to render assistance in placing pen registers. The Telephone Company also expresses fear of civil or criminal liability which would or could result in harm to it from obedience to the Court's Order. None of these arguments has merit.

* Technically, the same assistance from the Telephone Company is required for the placement of a pen register as would be required for a wiretap. However the Telephone Company's fears of criminal and civil liability are less because a pen register does not "intercept" communications, but only records digits. The Government submits that recording the numbers of outgoing calls placed from a particular telephone cannot even constitute an invasion of privacy.

1. Criminal Liability

The suggested basis for possible criminal liability is Section 605 of the Communications Act, which prohibits, with certain exceptions, disclosing the existence, contents, etc. of wire communications, unless the permission of the addressee or his agent or attorney is obtained. Among those exceptions is "... (6) on demand or other lawful authority." The Seventh Circuit in the *Illinois Bell and Finn, supra*, decisions concluded that "a search warrant supported by probable cause is a 'demand of other lawful authority' within exception (6)." *United States v. Finn, supra*, 502 F.2d at 943; *United States v. Illinois Bell, supra*. The District Court's order of March 19, 1976, while not in the form of a search warrant, is an order "in the nature of a . . . search warrant" and is supported by probable cause, and is likewise within exception (6). There is no basis for criminal liability on the part of the Telephone Company.

2. Civil Liability

The Telephone Company also argues that it may be subject to civil liability under the Civil Rights Act, Title 42, United States Code, Section 1983. However, the order of the District Court could be interposed as a defense in any civil damage suit which might be brought under that statute. Congress expressly made such good faith reliance a defense to both criminal and civil suits under the terms of Title III. Recognizing that Title III and its defense provisions are not applicable to a pen register situation, the government nevertheless contends that the analogue is persuasive.

This assumes, of course, that a civil suit would survive a threshold motion to dismiss. To the extent that any such suit rested upon a claimed invasion of privacy, the

answer would be that there has been none, where only the identity of the called party was discovered. This information is routinely collected where Message Unit Detail is accumulated and vulnerable to subpoena. Further, in response to a claim of an invasion of privacy by use of a pen register, one court has stated:

"Conversations searched and seized from defendants not individually specified in the surveillance authorization order are held to be admissible against them under Title III. It follows from this that the seizure of the identity of these unspecified individuals is likewise proper under the Fourth Amendment. Seizing one's identity can be no greater an intrusion on individual privacy than seizing one's conversation." *United States v. King*, 335 F. Supp. 523, 549 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973).

In short, the Telephone Company does not stand in realistic danger of either criminal or civil liability for having complied with the order of March 19, 1976.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PETER D. SUDLER being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 19th day of April, 1976
he served 2 copies of the within ' Brief
by placing the same in a properly postpaid franked envelope
addressed:

GEORGE ASHLEY, ESQ.
NEW YORK TELEPHONE CO.
1095 AVENUE OF AMERICAS
NEW YORK, N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Peter D. Sudler

Sworn to before me this
19th day of April, 1976

Steven K. Frankel
STEVEN K. FRANKEL
Notary Public, State of New York
No. 24-4607105
Qualified in Kings County
Commission Expires March 30, 1977